Supreme Court, U.S.
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No. 97-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

G. WAYNE "DUKE" SMITH, *et al.*,

Petitioners,

v.

KEVIN L. HARRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID Z. NEVIN
(Counsel of Record)
DENNIS BENJAMIN
NEVIN, HERZFELD
& BENJAMIN LLP
P.O. Box 2772
Boise, Idaho 83701
(208) 343-1000

ELLISON MATTHEWS
MATTHEWS LAW OFFICE
P.O. Box 1988
Boise, Idaho 83701
(208) 336-1433

Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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QUESTION PRESENTED

Should this Court exercise its certiorari jurisdiction in order to review the sufficiency of a complaint that has already been reviewed and found sufficient by both the District and Circuit Courts?

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STATEMENT OF THE CASE

Nature of the Case

This is a *Bivens*[1] action filed by Kevin L. Harris to recover damages for violation of his constitutional rights by the Defendant federal agents.

Course of Proceedings and Disposition

The activities which underlie Mr. Harris's causes of action arose between August 21, 1992 and July 8, 1993. Mr. Harris filed his Complaint on August 16, 1994, and his Second Amended Complaint on September 13, 1995. The case was assigned to the Hon. B. Lynn Winmill, United States District Judge for the District of Idaho.

The Petitioners and the other Defendants filed their motions to dismiss on the pleadings, raising the issue of qualified immunity. Judge Winmill in part granted and in part denied the motions in his Memorandum Decision and Order of May 28, 1996. The claims that the defendants were entitled to qualified immunity were denied. The defendants filed timely Notices of Appeal.

Statement of Facts

The following statement of facts is taken from Plaintiff's Second Amended Complaint (Complaint), which on appeal from denial of the Defendants' 12(b)(6) motion is taken to be true.

On August 21, 1992, a team of six Deputy United States Marshals (DUSMs), including Defendant-Appellants Arthur Roderick and Larry Cooper, and William

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[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Degan, traveled surreptitiously to a remote area of Boundary County, Idaho, which was owned by Randall W. Weaver (the Weaver property). Their ostensible purpose was to serve, or to prepare to serve, an arrest warrant upon Randall W. Weaver. Complaint at ¶ ¶ 27 & 29.

Kevin Harris was a family friend of the Weavers who was living part time at the Weaver property. There was no warrant outstanding for his arrest. During the late morning of the 21st, at the intersection of two primitive roads near the Weaver property known as "the Y," Cooper, Degan and Roderick confronted Kevin Harris, Randall W. Weaver, Weaver's 14-year-old son Sammy, and the Weaver family dog, a large yellow Labrador retriever named Striker. Complaint at ¶ ¶ 31; 36.

Roderick shot and killed the dog, even though it posed no threat whatever to the DUSMs (indeed, Striker was shot in the back after having turned to run toward his home). Complaint at ¶ 32. Sammy Weaver was standing in the immediate area, and in the general line of fire, when Striker was killed. In surprise and fear at seeing his dog shot and killed, he swore at Roderick and fired two shots from his rifle in Roderick's direction. He then turned to run home, calling to his father, "I'm coming, Dad. . . ." Complaint at ¶ 33.

After Sammy fired at Roderick, the woods where Cooper and Degan were hiding erupted with gunfire from their weapons. One of the two, probably Degan, fired at Sammy with sufficient accuracy to shoot the gun he was holding, grazing its stock and opening a gaping shredding wound in Sammy's right arm. Another of the two, probably Cooper, shot at Sammy as he was running *away* from the scene, at a time after the gun had been shot from Sammy's hands, and when he in any event no longer posed a threat to anyone. The shot hit Sammy square in

the back, piercing his heart, and passing out of his front chest wall. The boy cried out briefly, and dropped dead on the path. Complaint at ¶ 34.

In the melee of firing in which Sammy was killed, Kevin Harris fired one or more shots into the woods in the area of the persons he perceived to be trying to kill him and Sammy. These shots were fired by Kevin Harris in lawful defense of himself or another, that is, upon the reasonable belief that the shots were necessary to prevent his own death and/or the death of his young friend Sammy. During this shooting William Degan was hit in the upper left shoulder with a single round, from which he died. Kevin Harris may have fired the shot which killed William Degan. Complaint at ¶ 35.

The DUSMs had no warrant for the arrest of Kevin Harris or Sammy Weaver, nor were they justified by any other provision of law or circumstance in using force, deadly or otherwise, against Striker, Sammy Weaver, or Kevin Harris. Complaint at ¶ 36.

In order to conceal their own responsibility for the deaths of William Degan and Sammy Weaver, and for other improper purposes, Larry Cooper and Arthur Roderick met and decided to lie about how the incident actually occurred. In particular, they decided to say that Kevin Harris fired the first shot at the "Y," and that he otherwise acted solely as an aggressor and not in self defense. Based on these lies, a warrant was issued for the arrest of Kevin Harris and he was charged with murder. Complaint at ¶ ¶ 37 & 38.

The FBI soon dispatched to the scene its renowned "Hostage Rescue Team" (HRT). The HRT is a group of highly trained FBI agents whose purpose is to deal with crisis situations. Defendant Lon Horiuchi is a member of the HRT.

The HRT (like all FBI agents) is obligated to operate under the FBI's Rules of Engagement. These rules provide that an FBI agent may kill a person with whom he or she comes into contact only when the person presents an immediate risk of death or great bodily harm to the agent or to another person. Complaint at ¶ ¶ 40-2.

In this case, however, for the first time in the history of the FBI, a group of the Defendants, *i.e.* the Petitioners in this proceeding, conspired to create "Special" Rules of Engagement. Under these special rules, the HRT was ordered that *any* armed adult observed in the vicinity of the Weaver cabin could and should be killed (upon additional studied reflection, the Rules were later modified to provide that any armed adult *male* could and should be killed on sight). In the euphemistic language of the rules themselves, persons were to be "the subject of deadly force," irrespective of whether they posed a risk of flight, a threat of death or serious injury to anyone, or had been warned of the presence or identity of law enforcement officers. Complaint at ¶ ¶ 43, 45.

By mid afternoon on August 22, 1992, acting under the Special Rules of Engagement, elements of the HRT, including Horiuchi, took up a variety of positions on a hill overlooking the Weaver cabin. Horiuchi was a HRT "sniper," superbly trained and equipped, capable of reliably hitting a ¼" target at 200 meters with his .308 caliber snipers' rifle. Complaint at ¶ ¶ 47-9.

At about 6 p.m., Randy Weaver, his daughter Sarah, and Kevin Harris were inside the Weaver cabin, unaware of the throng of FBI agents and others outside. They made a decision to go to a nearby shed where they had placed the body of Sammy Weaver, washed and wrapped in preparation for burial. As the three left the home, they were observed by Horiuchi and others.

Horiuchi testified under oath in the criminal proceedings against Mr. Harris that he intended to shoot and kill as many of the persons in the cabin as he possibly could. He therefore did not take his first opportunity to shoot Randy, Kevin or Sarah because he believed it was possible yet more persons would come out of the cabin, and that they could be shot and killed as well. Complaint at ¶¶49-50.

Shortly, however, as Randy Weaver reached up to open the latch on the shed where his son's body lay, Horiuchi shot him in the back, in the fleshy skin under his armpit. Randy Weaver called out in a loud voice that he had been shot, and Randy, Sarah and Kevin then ran to the cabin. Complaint at ¶¶51-53.

In this, Mr. Harris threatened no one. He did not take cover and return fire, or attempt to do so. Nor was he attempting to avoid arrest – rather he sought by returning to the cabin simply to provide cover for himself against Horiuchi's ruthlessly efficient and unlawful effort to kill him. No warning of the presence of the law enforcement officers, or any demand that he surrender, had been provided to Mr. Harris or the Weavers. On the contrary, a warning would have compromised Horiuchi's plan to kill Mr. Harris and Mr. Weaver. Complaint at ¶¶51-3; 60-62; 99; 103.

Hearing Horiuchi's first shot and the shouts of her husband, Vickie Weaver came to the front door of the cabin. Holding the Weavers' infant daughter Elisheba in one hand, Vickie Weaver held the cabin door open with her other hand. As Randy and Sarah Weaver and Kevin Harris ran toward the front door, Horiuchi fired his rifle. The bullet from Horiuchi's rifle struck a clear glass window in the open door, passing through it and into the head of Vickie Weaver who was standing immediately

behind the window, passing through Vickie Weaver's head and into the upper left arm and chest of Kevin Harris. The shot killed Vickie Weaver and very nearly killed Kevin Harris. The injuries suffered by Mr. Harris as a result of this shooting are among those which are the subject of the present suit. Complaint at ¶¶55-59.

Not until immediately *after* the shootings of Randy Weaver, Vickie Weaver, and Kevin Harris, did the FBI advise the persons in the cabin that law enforcement officers were outside their home, and that their surrender was demanded. It did this by driving a military tank into the front yard of the residence and making the announcement over a loudspeaker. Complaint at ¶62.

With Sammy Weaver, age 14, shot in the back and dead in the nearby shed, Vickie Weaver's dead body wrapped in blankets on the kitchen floor, Kevin Harris shot and near death, and Randy Weaver shot in the back, the persons in the cabin reasonably disbelieved the FBI's assurances that if they simply came out of the cabin they would be protected. Reasonably believing that if they came outside the cabin they would be killed, the persons inside the cabin, including Kevin Harris, were forced to remain inside the cabin. Despite a shortage of food, water, and other necessities of life, Kevin Harris remained inside the cabin for some eight days before finally surrendering.

Mr. Harris was in such intense physical pain and suffering, and also suffering from emotional despair, that he begged other persons present in the cabin to kill him, in order to end his misery and suffering. Complaint at ¶¶66-69.

Mr. Harris and Mr. Weaver were charged with the murder of Mr. Degan, as well as a host of other offenses

in the case of *United States of America v. Randall Weaver and Kevin Harris,* D. Idaho Case No. 92-N-080-EJL. On July 8, 1993, the jury returned its verdict acquitting Kevin Harris of all charges against him. Complaint at ¶ 75.

Subsequently, Mr. Harris filed a *Bivens* type claim against each of the petitioners.

REASON FOR DENYING THE WRIT

THE PETITION FAILS TO IDENTIFY AN ISSUE WORTHY OF THIS COURT'S ATTENTION

The petitioners ask this Court to conduct a factually-based analysis of the sufficiency of the Complaint. This, of course, has already been done, not once but twice, by the lower courts. The parsing of an individual complaint to determine whether it complies with well-settled law is not a matter which warrants this Court's time and effort.

It is worth noting that the petitioners never identify a basis for the exercise of this Court's certiorari jurisdiction. They do not claim there is a Circuit conflict. They do not claim that the Circuit Court's decision is in conflict with a decision of a state court of last resort. They do not claim that either the District or Circuit Court has so far departed from the accepted and usual course of judicial proceedings to warrant this Court's exercise of its supervisory powers. *See,* S.C.R. 10. They do not even claim that the Circuit failed to identify the proper legal standard to apply. To the contrary, they concede that the Ninth Circuit law imposes a "heightened pleading standard" to conspiracy claims. Petition for Writ of Certiorari at 8, *citing Branch v. Tunnell,* 14 F.3d 449

(9th Cir.), *cert. denied*, 512 U.S. 1219 (1994).[2] Finally, they do not argue that the standard should be different from the Circuit law on the subject.

Instead, the petitioners merely argue that, in their view, the Circuit Court panel failed to correctly apply well-settled law to the particular facts of this case. That, however, even if it were true, is not a "compelling reason" which would justify the granting of review. That is why "[a] petition for writ of certiorari is rarely granted when the asserted error consists of an erroneous factual finding or the misapplication of a properly stated rule of law." S.C.R. 10.

The proper avenue for the petitioners would have been for them to file a petition for rehearing in the Circuit Court, as did the other defendants in this case.[3] *See*, F.R.A.P. 40 (petition for rehearing appropriate when Circuit has misapplied facts of case to applicable law). The fact that the petitioners failed, whether by strategy or neglect, to take advantage of the procedure available to them does not create a reason for this Court to grant review.

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[2]The rule in the Ninth Circuit is that "[i]n order to survive a motion to dismiss, plaintiffs must state in their complaint non-conclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Branch v. Tunnell* (*"Branch II"*), 14 F.3d at 452, *quoting*, *Branch v. Tunnell* (*"Branch I"*), 937 F.2d 1382, 1386 (9th Cir. 1991) (which adopted rule announced in *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 225 (1991)). This "heightened" pleading standard is applied in many other circuits. *See*, Petition for Writ of Certiorari at pg. 7, n.6 (cases collected).

[3]As noted in the Petition, two other defendants, Arthur Roderick and Larry Cooper, filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which is currently pending.

Finally, it is not necessary for this Court to hold the Petition pending its decision in *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (*en banc*), *cert. granted*, 117 S.Ct. 2451 (June 16, 1997, argued December 1, 1997) (No. 96-827). In that case, the U.S. Court of Appeals for the District of Columbia held: 1) that a civil rights plaintiff need not allege "direct" evidence of unconstitutional motive and 2) that "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." 93 F.3d at 815.

As to the first holding, the D.C. Circuit abandoned the approach used in its previous qualified immunity cases such as *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 225 (1991), and replaced it with a lower standard. The Ninth Circuit, as previously noted, adopted the D.C. Circuit's *Siegert* pleading requirement in *Branch I.* 927 F.2d at 1386. And that was the pleading standard applied by the Circuit Court in this case. In other words, Mr. Harris's pleading has already been tested by the more stringent standard of *Siegert.* Thus, it would also be found sufficient under the less demanding approach of the D.C. Circuit in *Crawford-El.*

Further, this Court should not hold the Petition pending its resolution of the second holding in *Crawford-El* because the "clear and convincing evidence" requirement announced by the D.C. Circuit applies only to summary judgment motions. However, no summary judgment motion has been filed in this case. This case is on appeal from a denial of a motion to dismiss.[4] And in the

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[4]The District Court clearly stated that it was not considering the petitioner's motion as one for summary judgment. *See,*

[footnote continued]

absence of such a motion, this Court's eventual resolution of that issue will have no effect on this appeal.

CONCLUSION

For the foregoing reasons, Kevin Harris requests that the petition be denied.

Respectfully submitted,

DAVID Z. NEVIN
DENNIS BENJAMIN
NEVIN, HERZFELD
& BENJAMIN
P.O. Box 2772
303 W. Bannock Street
Boise, Idaho 83701
(208) 343-1000

ELLISON M. MATTHEWS
MATTHEWS LAW OFFICES
P.O. Box 1988
413 W. Jefferson Street
Boise, Idaho 83701
(208) 336-1433

Attorneys for Respondent
Kevin L. Harris.

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District Court Memorandum Decision, in Petition for Writ of Certiorari at pg. 33a.